

1 CONTINUED APPEARANCES:

2 ANTHONY J. WEIBELL, ESQUIRE
3 WILSON SONSINI GOODRICH & ROSATI
4 650 PAGE MILL ROAD
5 PALO ALTO, CA 94304-1050
6 AWEIBELL@WSGR.COM

7 DEFENSE ATTORNEY
8 GOOGLE, LLC

9 ALSO PRESENT:

10 STEPHEN G. GRYGIEL, ESQUIRE
11 ADAM SHULMAN, ESQUIRE
12 JOHN CEGLIA
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1 (THE CLERK OPENS COURT.)

2 THE COURT: CAN YOU ALL SEE ME AND HEAR
3 ME. I'M MUTED HERE. LET'S SEE. GOOD AFTERNOON.

4 THIS IS A HEARING ON THE MOVANT'S MOTION
5 FOR PRELIMINARY APPROVAL.

6 MAY I HAVE THE APPEARANCES OF COUNSEL
7 BEGINNING WITH COUNSEL FOR PLAINTIFF.

8 MR. STRANGE: YES. GOOD AFTERNOON, YOUR
9 HONOR. THIS IS BRIAN STRANGE FOR THE PLAINTIFFS.

10 THE COURT: AND FOR GOOGLE?

11 MR. WEIBELL: THIS IS ANTHONY WEIBELL FOR
12 DEFENDANT GOOGLE.

13 THE COURT: AND WE ALSO HAVE ON THE LINE
14 THE OBJECTOR AND COUNSEL.

15 WOULD YOU IDENTIFY YOURSELVES?

16 MR. SHULMAN: GOOD AFTERNOON, JUDGE
17 ROBRENO. ADAM SHULMAN HERE ON BEHALF OF OBJECTOR,
18 THEODORE H. FRANK.

19 THE COURT: VERY WELL.

20 IS MR. FRANK ON HERE AS WELL OR NOT?

21 MR. SHULMAN: HE IS NOT. I HAVE BEEN
22 LEADING THE REPRESENTATION AT THE DISTRICT.

23 THE COURT: THAT IS FINE. I WAS JUST
24 TOLD THAT HE HAD REQUESTED A LINK.

25 WELL, THIS IS A MATTER THAT WAS REMANDED

1 BY THE THIRD CIRCUIT. THE ORIGINAL JUDGE, JUDGE
2 ROBINSON HAS RETIRED, SO I WAS TASKED WITH THE JOB OF
3 SEEING WHAT WE WERE GOING TO DO WITH THIS CASE.

4 THERE HAS BEEN THE FILING BY THE PARTIES
5 SEEKING A PRELIMINARY APPROVAL OF THE SETTLEMENT WITH
6 GOOGLE.

7 READING THE OPINION AND READING THE
8 MEMORANDUM OF LAW IS SOMEWHAT LIKE TWO SHIPS PASSING IN
9 THE NIGHT. I THINK THAT I'M LEFT WITH A LITTLE BIT OF
10 UNCERTAINTY AS TO HOW IT IS THAT PLAINTIFFS' CLASS
11 INTENDS TO SATISFY THE MANDATE FROM THE THIRD CIRCUIT
12 AND THAT IS REALLY THE FOCUS OF WHAT WE ARE DOING TODAY.

13 I SEE THAT YOU ARE SEEKING TO CERTIFY A
14 (B) (3) CLASS.

15 I DID NOT SEE ANY PROVISIONS WHICH WOULD
16 ALLOW THE COURT TO MEET THE THIRD CIRCUIT'S
17 ASCERTAINABILITY. SO MAYBE WE CAN START THERE BY ASKING
18 PLAINTIFF'S COUNSEL SINCE THERE WAS NOTHING IN YOUR
19 BRIEF ABOUT THAT, WHAT DO WE DO?

20 THERE IS A REQUIREMENT UNDER (B) (3) IN
21 THIS CIRCUIT.

22 MR. STRANGE: THANK YOU, YOUR HONOR,
23 BRIAN STRANGE.

24 IS YOUR QUESTION REGARDING THE
25 ASCERTAINABILITY?

1 THE COURT: YES.

2 MR. STRANGE: LET ME JUST FIRST ADDRESS
3 THE PROCEDURAL POSTURE WHICH I THINK YOUR HONOR HAS
4 PROBABLY GRASPED FROM THE FILE BUT AS YOU KNOW THIS CASE
5 WAS FILED NINE YEARS AGO AND IT WAS REALLY AT THE
6 BEGINNING OF THE INTERNET DATA AND THE INTERNET PRIVACY
7 ISSUES. AND THE CASES WERE CONSOLIDATED IN THE DISTRICT
8 COURT OF DELAWARE AND WE BEGAN OUR DISCOVERY AGAINST
9 GOOGLE.

10 THIS CASE AROSE OUT OF THE SAFARIGATE
11 ISSUE, WHICH YOU MAY OR MAY NOT RECALL, BUT ALLEGATIONS
12 WERE BROUGHT BY US AND OTHERS THAT GOOGLE INTENTIONALLY
13 CIRCUMVENTED THE WEB BROWSERS ON COMPUTERS TO PUT THESE
14 TRACKING COOKIES ON THE CLASS MEMBERS WEB BROWSERS.

15 SO WITH RESPECT TO THE CASE, WE CAME TO A
16 SETTLEMENT AND IT WAS DIFFICULT TO DETERMINE THE BEST
17 WAY TO RESOLVE THIS CASE, YOUR HONOR, BECAUSE THERE WAS
18 A NUMBER OF CLASS MEMBERS THAT WE BELIEVE HAD THESE
19 COOKIES PLACED ON THEIR COMPUTER AND ONE OF THE ISSUES
20 WHICH RELATES DIRECTLY TO ASCERTAINABILITY IS, HOW WERE
21 THESE COOKIES PLACED ON THE COMPUTER, AND WHO DID IT
22 AFFECT?

23 WHAT IT APPEARS TO US THAT HAPPENED AFTER
24 CONSULTING WITH EXPERTS IS THAT THE SAFARI APPLE
25 COMPUTERS COME WITH A PROVISION ON THEIR COMPUTER THAT

1 BASICALLY BARS TRACKING COOKIES, AND IN ORDER TO ALLOW
2 YOUR COMPUTER TO HAVE COOKIES -- THIS IS A LONG TIME
3 AGO, AS YOU MIGHT RECALL -- YOU HAD TO ACTUALLY
4 PHYSICALLY ALLOW THE COMPUTER TO GO TO WEBSITES AND HAVE
5 COOKIES TRACKING ON THEM.

6 NOW, WHEN YOU GO TO A WEBSITE, IT SAYS
7 WILL YOU ACCEPT COOKIES AND YOU HAVE TO SAY YES OR NO
8 AND IF YOU SAY NO, THEN THEY SAY WELL, SORRY, WE CAN'T
9 LET YOU ON OUR WEBSITE. THAT HAPPENED SOMEWHAT AS A
10 RESULT OF WHAT HAPPENED IN THIS CASE WHICH WAS THERE
11 WERE THESE COOKIES BEING PLACED ON CONSUMERS' COMPUTERS
12 WITHOUT THEIR KNOWLEDGE, AND SO THIS CASE, LIKE MANY
13 OTHERS THAT WERE INITIALLY BROUGHT IN THE INTERNET, IN
14 THE BEGINNING OF THESE DATA ISSUES WAS THROWN OUT IN ITS
15 ENTIRETY BY THE COURT SAYING, THAT THE PLAINTIFFS REALLY
16 WEREN'T DAMAGED. HOW WERE THEY DAMAGED JUST BECAUSE
17 THIS COOKIE WAS PLACED ON THEM AND MAYBE GOOGLE KNEW
18 WHAT THEY WERE SEARCHING BUT WHY IS THERE DAMAGE THERE?

19 SO IT WAS AN ARTICLE III ARGUMENT, YOUR
20 HONOR, THAT THERE WAS BASICALLY NO DAMAGE. THE COURT
21 AGREED AND MANY COURTS ACROSS THE COUNTRY WERE THROWING
22 THESE CASES OUT. IT WENT UP TO THE COURT OF APPEALS.
23 THE COURT OF APPEALS IN A PUBLISHED DECISION WHICH WAS
24 PRETTY SEMINAL TO THESE DATA PRIVACY ISSUES. THERE IS
25 ARTICLE III DAMAGE. IF YOU ARE TRYING TO COLLECT

1 PEOPLE'S DATA WITHOUT THEIR KNOWLEDGE AND -- BUT
2 DISMISSED OUR STATUTORY CLAIMS; LEFT ONLY OUR CLAIMS FOR
3 PRIVACY UNDER THE CALIFORNIA CONSTITUTION AND CALIFORNIA
4 COMMON LAW.

5 SO THEN WE CAME DOWN TO THE DISTRICT
6 COURT AND TRIED TO NEGOTIATE A SETTLEMENT REGARDING
7 THOSE TWO CLAIMS AND, YOU KNOW, WE KNEW THROUGH EXPERT
8 OPINION THAT GOOGLE HAD CIRCUMVENTED PARTS OF PEOPLES'
9 COMPUTERS AND DID GET ACCESS TO THESE COOKIES BUT THE
10 NUMBER OF CLASS MEMBERS WAS DIFFICULT AND WE ALSO KNEW,
11 THROUGH TALKING TO EXPERTS, THAT IT WAS GOING TO BE VERY
12 EXPENSIVE TO IDENTIFY ALL OF THE CLASS MEMBERS. SO WE
13 WENT INTO SETTLEMENT DISCUSSIONS WITH GOOGLE AND RETIRED
14 JUDGE LAYN PHILLIPS TO HAVE A SETTLEMENT THAT ADDRESSED
15 THE ISSUE OF THIS, WHAT WE CALLED, AN INTENTIONAL
16 CIRCUMVENTION OF THESE WEB BROWSER ACTIVITIES AND TO
17 PROVIDE SOME BENEFIT TO THE CLASS.

18 SO WE KNOW THAT THE CLASS IS THOSE
19 MEMBERS THAT HAD SAFARI WEB BROWSERS AND THE MICROSOFT
20 WEB BROWSER AND THAT HAD THESE COOKIES PLACED ON THEM
21 BUT THE NUMBER AND EXTENT OF THOSE CLASS MEMBERS IS, WE
22 THINK IT IS IN THE MILLIONS BUT FRANKLY DIFFICULT TO
23 IDENTIFY AND WOULD BE VERY EXPENSIVE TO IDENTIFY. I
24 DON'T THINK IT'S IMPOSSIBLE TO IDENTIFY THOSE AT ALL AND
25 FROM TALKING WITH EXPERTS, IT'S JUST GOING TO BE

1 EXTREMELY EXPENSIVE TO DEVELOP THE TECHNOLOGY TO FIGURE
2 OUT EXACTLY HOW MANY CLASS MEMBERS THERE WERE.

3 SO IN OUR SETTLEMENT DISCUSSIONS WE CAME
4 UP WITH A SETTLEMENT THAT INVOLVED AN EXTENSIVE NOTICE
5 PROGRAM PUT TOGETHER BY -- IT WAS GARDEN CITY, NOW IT
6 HAS BEEN ACQUIRED BY EPIC, HAD A VERY EXTENSIVE NOTICE
7 PROGRAM THAT INCLUDED A SETTLEMENT WEBSITE. IT INCLUDED
8 ADS ON FACEBOOK. IT INCLUDED ADS IN PEOPLE MAGAZINE.
9 IT INCLUDED TARGETED ADS ALL OVER THE INTERNET. ON THE
10 WEBSITE ALONE WE HAD OVER 563,000 HITS TO LOOK AT THIS
11 WEBSITE.

12 AFTER THIS PUBLISHED NOTICE TO ALL THESE
13 CLASS MEMBERS, WE RECEIVED 50 PEOPLE WHO WANTED TO
14 OPT-OUT, AND WE RECEIVED ONE OBJECTION. SO UNDER THAT
15 NOTICE PROGRAM, WE BELIEVE THAT THE POTENTIAL CLASS
16 MEMBERS WERE NOTIFIED OF THE SETTLEMENT. WE HAD A
17 HEARING ON THAT ISSUE AND WE ATTACHED A SUPPLEMENTAL
18 DECLARATION ON THAT NOTICE WHICH WE BELIEVE IS THE BEST
19 PRACTICAL NOTICE WHEN SIMILARLY APPROVED BY OTHER COURTS
20 IN THIS COUNTRY. SO WE BELIEVE WITH RESPECT TO THIS
21 MOTION THAT THAT PRIOR NOTICE IS SUFFICIENT, THE BEST
22 PRACTICAL NOTICE UNDER A (B) (3) CLASS.

23 AND AFTER THE COURT APPROVED THE NOTICE
24 AND APPROVED THE SETTLEMENT, WHICH, AS YOUR HONOR KNOWS,
25 INCLUDES FIVE MILLION, FIVE HUNDRED THOUSAND IN FUNDS TO

1 BE USED ON A CY PRES DISTRIBUTION. THERE WAS AN APPEAL
2 FILED AND WE WENT UP TO THE THIRD CIRCUIT FOR THE SECOND
3 TIME.

4 AS I INDICATED, THE FIRST TIME THE THIRD
5 CIRCUIT REVERSED THE COURT ON THE COURT OF APPEAL FOR
6 THE SECOND TIME THE THIRD CIRCUIT HELD THAT YOU CAN HAVE
7 CY PRES, ONLY CY PRES, AND IT DOES NOT HAVE TO BE
8 DAMAGES DIRECTLY GIVEN TO THE CLASS WHICH WAS THE FIRST
9 ARGUMENT BY THE OBJECTOR BUT THE COURT BASICALLY RAISED
10 TWO ISSUES WITH US.

11 THE ISSUE OF TYPICALITY AND COMMONALITY
12 AND NUMEROSITY WERE NOT CHALLENGED AND WE BELIEVE HAVE
13 BEEN ESTABLISHED. THE COURT HAD TWO ISSUES THAT IT WAS
14 CONCERNED WITH.

15 THE FIRST WAS WITH RESPECT TO THE CY PRES
16 RECIPIENTS, DID THEY HAVE A RELATIONSHIP WITH EITHER
17 CLASS COUNSEL OR GOOGLE SUCH THAT THERE WAS SOME KIND OF
18 APPEARANCE OF IMPROPRIETY, AND SO WE ADDRESSED THAT IN
19 OUR REVISED SETTLEMENT AGREEMENT TO REQUEST, AS
20 SUGGESTED BY THE THIRD CIRCUIT, THAT THE COURT APPOINT A
21 NEUTRAL TO CONSIDER APPLICATIONS FOR WHO SHOULD RECEIVE
22 THE CY PRES FUNDS. SO THAT IS THE FIRST ISSUE IN THE
23 COURT OF APPEALS DECISION WHICH WE THINK WAS PROPERLY
24 ADDRESSED BY THE PENDING SETTLEMENT BEFORE THE COURT.

25 THE SECOND ISSUE WAS THE COURT SAID YOU

1 CERTIFIED THIS UNDER A (B) (2) CLASS AND YOU ARE ASKING
2 FOR A RELEASE THAT APPEARS TO RELEASE DAMAGES UNDER A
3 (B) (3) TYPE ANALYSIS AND IS IT APPROPRIATE UNDER A
4 (B) (2) CLASS TO GIVE THAT BROAD OF A RELEASE.

5 AND THE WAY THAT WE HAVE ADDRESSED THAT,
6 YOUR HONOR, IS WE HAVE REQUESTED CERTIFICATION UNDER
7 (B) (3) BECAUSE NUMBER ONE, WE BELIEVE THE NOTICE WAS THE
8 BEST PRACTICAL NOTICE, AS I HAVE INDICATED, AND THE
9 ISSUES BEFORE THE COURT, WHICH I THINK YOU NEED TO
10 CONSIDER, ARE THE PREDOMINANCE AND SUPERIORITY ISSUES
11 UNDER (B) (3).

12 WITH RESPECT TO THE PREDOMINANCE ISSUE, I
13 BELIEVE THAT THE CENTRAL ISSUE HERE WHICH IS PREDOMINANT
14 FOR ALL THE CLASS MEMBERS IS, DID GOOGLE INTENTIONALLY
15 CIRCUMVENT THE RESTRICTIONS ON PEOPLES' WEB BROWSERS AND
16 INSERT COOKIES?

17 WE BELIEVE THAT THAT ISSUE IS COMMON TO
18 ALL THE CLASS MEMBERS AND WHEN THAT WOULD BE A CENTRAL
19 ISSUE IN THIS CASE. AND --

20 THE COURT: I THINK I HAVE HEARD ENOUGH
21 OF YOUR VERSION OF WHAT THIS CASE IS ABOUT.

22 LET ME GO BACK TO MY INITIAL QUESTION AND
23 I APPRECIATE IF YOU WOULD ADDRESS MY QUESTIONS.

24 THE FIRST QUESTION IS, HOW ARE YOU GOING
25 TO MEET THE ASCERTAINABILITY REQUIREMENT OF THE THIRD

1 CIRCUIT REQUIRING IT RELIABLE AND ADMINISTRATIVELY
2 FEASIBLE MECHANISM FOR IDENTIFYING THE CLASS MEMBERS?

3 MR. STRANGE: YES, YOUR HONOR.

4 I THINK THE CLASS MEMBERS AS DEFINED
5 UNDER THE CLASS DEFINITION IS ALL THE -- LET ME READ THE
6 EXACT LANGUAGE TO YOUR HONOR.

7 THE SETTLEMENT CLASS CONSISTS OF ALL
8 PERSONS IN THE UNITED STATES OF AMERICA WHO USED APPLE
9 SAFARI OR MICROSOFT INTERNET EXPLORER WEB BROWSERS AND
10 WHO VISITED A WEBSITE, THIS DOUBLE CLICKED AD COOKIE
11 WHICH IS GOOGLE'S ADVERTISING SERVICE WHERE COOKIES WERE
12 PLACED.

13 THE COURT: IDENTIFIES MEANS, WHO ARE
14 THEY?

15 MR. STRANGE: RIGHT AND SO --

16 THE COURT: EVERYBODY IN THE CLASS IS A
17 CLASS MEMBER BUT THAT IS NOT IDENTIFYING. OKAY. LET'S
18 MOVE ON.

19 MR. STRANGE: WELL, I DON'T THINK --

20 THE COURT: LET'S MOVE ON. YOU HAVE NO
21 ANSWER TO THAT.

22 NUMBER TWO, YOU DID NOT ADDRESS FOR A
23 (B) (3) CLASS ANY OF THE 23 FACTORS OR GIRSH OR
24 PRUDENTIAL FACTORS, AND LET ME JUST BACKUP HERE BECAUSE
25 I THINK THAT I WANT TO READ YOU WHAT THE THIRD CIRCUIT

1 SAID ABOUT THIS CASE.

2 THE VISTA VIEW OF THIS CASE IS NOT
3 PRETTY.

4 ACCORDING TO THE COMPLAINT AN INTERNET
5 BEHEMOTH WITH UNPRECEDENTED TOOLS FOR MONITORING PRIVATE
6 CONDUCT TOLD MILLIONS OF AMERICANS, IT WOULD NOT TRACK
7 THEIR PERSONAL BROWSER HISTORY, AND THEN THEY DID SO
8 ANYWAY TO PROFIT FROM THE DATA. THROUGH THEIR PROPOSED
9 CLASS ACTION SETTLEMENT, THE PURPORTED WRONG DOER
10 PROMISED TO PAY A COUPLE MILLION DOLLARS TO CLASS
11 COUNSEL, MAKE A CY PRES CONTRIBUTION TO ORGANIZATIONS IT
12 WAS ALREADY DONATING TO, (AT LEAST ONE OF WHICH HAD AN
13 AFFILIATION WITH CLASS COUNSEL.) BY SEEKING A
14 CERTIFICATION UNDER RULE 23 (B) (2), THE DEFENDANT AND
15 CLASS COUNSEL AVOID THE ADDITIONAL SAFEGUARDS THAT APPLY
16 TO RULE 23 (B).

17 ONE MAY THINK THIS WOULD LEAVE ROOM FOR
18 CLASS MEMBERS TO PURSUE DAMAGES INDIVIDUALLY; YET, THAT
19 RELIEF IS FORECLOSED AS WELL, AS THE SETTLEMENT CONTAINS
20 A NATIONWIDE RELEASE OF CLAIMS FOR MONEY DAMAGES THAT
21 AROSE AND COULD ARISE WHERE THERE ARE UNAUTHORIZED
22 SNOOPING PRESUMABLY COVERING TENS, IF NOT HUNDREDS OF
23 MILLIONS OF AMERICANS.

24 I WOULD NOT BE PROUD TO HAVE PRESENTED
25 THIS SETTLEMENT AGREEMENT TO A COURT. SO LET'S BEGIN

1 WITH THAT.

2 THIS IS NOT A MATTER OF JUST SIMPLY
3 WORKING AT THE MARGINS.

4 THIS IS A MATTER THAT MAYBE THE THIRD
5 CIRCUIT WAS TOO POLITE TO CALL IT WHAT WAS IT WAS, A
6 SHAM, OKAY, SO LET'S BEGIN TO SEE WHETHER YOU HAVE
7 CORRECTED THAT.

8 NUMBER TWO --

9 MR. STRANGE: YOUR HONOR.

10 THE COURT: WELL, TELL ME THEN, WHERE IS
11 THE DISCUSSION OF 23(E)? WHERE IS THE DISCUSSION OF
12 GIRSH? WHAT IS THE DISCUSSION OF PRUDENTIAL?

13 MR. STRANGE: YOUR HONOR, I THINK IF YOU
14 BELIEVE THIS SETTLEMENT IS INAPPROPRIATE, IF IT'S NOT
15 ENOUGH MONEY, IF YOU DON'T THINK THAT WE PROPERLY
16 REPRESENTED THE CLASS, THEN I THINK WE SHOULD WITHDRAW
17 THIS SETTLEMENT AND CONTINUE LITIGATION, AND I RESPECT
18 YOUR OPINION. I'M HAPPY TO DO THAT BECAUSE WE CAN GET
19 THE EXPERTS AND WE CAN GO AGAINST GOOGLE AND WE CAN MAKE
20 THE NECESSARY DISCOVERY AGAINST THEM AND, I'M NOT
21 OPPOSED TO THAT, AND I CERTAINLY DON'T WANT TO PUT MY
22 NAME ON SOMETHING THAT YOUR HONOR THINKS IS
23 INAPPROPRIATE FOR THE ACTIONS THAT WE ALLEGED HAPPENED.

24 THE COURT: THAT IS WHY WE ARE HAVING
25 THIS HEARING. I WANT YOU TO CONVINCE ME THAT YOU CAN DO

1 IT. IT SEEMS TO ME THAT YOU CANNOT HAVE A (B) (3)
2 AGREEMENT UNDER THESE CIRCUMSTANCES AND I'M OPEN TO
3 HEARING WHAT YOU HAVE TO SAY WHEN GOOGLE GETS A RELEASE
4 AND NOBODY GETS ANY MONEY.

5 NOW, YOU MAY HAVE A (B) (2) CLASS IF YOU
6 COULD WORK ON THAT, GETTING INJUNCTIVE RELIEF PERHAPS,
7 AND THE CLASS WILL BENEFIT FROM THAT, YOU CAN HAVE A CY
8 PRES AND THAT IS THE END OF THE CASE, BUT THE RELEASE IS
9 REALLY SOMETHING, THAT, IN THE ABSENCE OF SOME BENEFIT,
10 TANGIBLE BENEFIT TO THE CLASS, I DON'T THINK IT'S
11 APPROPRIATE. THIS IS WHAT THE HEARING IS ABOUT.

12 MR. STRANGE: I UNDERSTAND, YOUR HONOR.

13 WITH RESPECT TO, I MEAN I GUESS THE
14 QUESTION YOU HAVE RAISED IS WHETHER A CY PRES ONLY
15 SETTLEMENT IS EVER APPROPRIATE IN A (B) (3) CLASS WITH A
16 DAMAGED RELEASE.

17 THE COURT: IT CAN BE APPROPRIATE. I
18 THINK THAT IS A BRIDGE TOO FAR.

19 THE QUESTION IS WHETHER IN THIS CASE IT
20 WOULD BE APPROPRIATE TO HAVE THAT TYPE OF BENEFIT WHEN
21 THE WRONGDOER GETS A RELEASE.

22 MR. STRANGE: WELL, I THINK, YOUR HONOR,
23 IN ANY, I APOLOGIZE BUT I BELIEVE IN ANY (B) (3) CLASS
24 SETTLEMENT THAT I HAVE BEEN INVOLVED WITH, THE DEFENDANT
25 IS GOING TO WANT TO GET A RELEASE OF ALL DAMAGED CLAIMS.

1 THE COURT: WELL, MAYBE CANNOT BE
2 CERTIFIED UNDER (B) (3) .

3 MR. STRANGE: WELL, THAT MAY BE, BUT YOUR
4 HONOR, I WILL POINT OUT THAT AFTER WE SENT THIS NOTICE,
5 THE PEOPLE DID HAVE AN OPPORTUNITY TO OPT-OUT AND THEY
6 DID. 50 PEOPLE DID. SO IT'S NOT LIKE PEOPLE WERE
7 PRECLUDED FROM THEIR DAMAGE CLAIMS. IF PEOPLE THOUGHT
8 THEY HAD GOOD DAMAGE CLAIMS, THEY COULD AND DID OPT-OUT.

9 NOW, ONE THING I WANT TO POINT OUT, YOUR
10 HONOR, UNDER THE REMAINING CLAIMS WHICH IS THE PRIVACY
11 CLAIMS UNDER THE CALIFORNIA CONSTITUTION AND CALIFORNIA
12 COMMON LAW, ON A CLASS-WIDE BASIS, REALLY THE ONLY
13 DAMAGES WE WOULD GET WOULD BE NOMINAL-TYPE DAMAGES.

14 FOR EXAMPLE, IF SOMEONE -- CLASSIC CASE
15 IS A PHOTOGRAPHER JUMPS OVER YOUR FENCE AND TAKES A
16 PICTURE OF YOUR HOUSE OR SOMETHING OR YOU IN THE GARDEN
17 AND JUMPS BACK AND SAYS: WELL, HOW HAVE YOU BEEN
18 DAMAGED? WELL, IT'S OFFENSIVE. IT'S OFFENSIVE THAT
19 SOMEONE WOULD VIOLATE THOSE KINDS OF PRIVACY, AND WHAT
20 WE HAVE HERE REALLY IS IT IS OFFENSIVE TO THESE CLASS
21 MEMBERS THAT THEY WERE BEING TRACKED BY GOOGLE WITHOUT
22 THEIR PERMISSION BUT THE QUESTION -- AND THIS IS WHAT
23 HAPPENED IN THE THIRD CIRCUIT -- INITIALLY, THE DISTRICT
24 COURT SAID: WELL, HOW HAVE YOU REALLY BEEN DAMAGED? WE
25 SAY, WE HAVE BEEN DAMAGED BECAUSE THEY HAD ACCESS TO OUR

1 DATA AND THEY SAY, SO WHAT? DID THEY SELL IT OR WHAT
2 DID THEY DO WITH IT? WE DON'T HAVE EVIDENCE THAT THEY
3 SOLD IT. SO THE DAMAGES REALLY ARE NOMINAL FOR THE
4 CLASS MEMBERS AS A RESULT OF THIS CONDUCT. THAT IS
5 REALLY WHAT WE ARE FACED WITH HERE. WE ARE FACED WITH
6 MILLIONS OF CLASS MEMBERS WHO HAVE THIS ISSUE BUT THE
7 DAMAGES ARE VERY NOMINAL UNDER THE REMAINING CLAIMS.

8 IF WE WOULD HAVE KEPT IN OUR STATUTORY
9 CLAIMS UNDER THE PRIVACY ACT, WE WOULD NOT BE SITTING
10 HERE WITH A FIVE AND-A-HALF MILLION DOLLAR SETTLEMENT.
11 IT WOULD BE FIVE HUNDRED AND FIFTY MILLION DOLLARS. I
12 CAN GUARANTEE IT. BECAUSE THERE ARE STATUTORY DAMAGES
13 THAT ARE MASSIVE FOR EACH CLASS MEMBER, BUT WITH THESE
14 NOMINAL-TYPE DAMAGES FOR PRIVACY, THE QUESTION THAT I
15 HAVE REPRESENTING THIS CLASS IS WHAT IS THE RIGHT THING
16 TO DO FOR THE CLASS?

17 THE COURT: IF THE THIRD CIRCUIT FELT
18 THAT THE VIEW OF THIS CASE IS NOT PRETTY, HOW HAS THAT
19 CHANGED WITH THE REVISED SETTLEMENT AGREEMENT?

20 MR. STRANGE: WELL, YOU KNOW, WHEN I READ
21 THAT DICTA, YOUR HONOR, I WAS, YOU KNOW, VERY CONCERNED
22 AND I DON'T REALLY AGREE WITH THE COURT.

23 I THINK THEIR CONCERN PRIMARILY WAS THE
24 FACT THAT THE CY PRES RECIPIENTS MAY HAVE A RELATIONSHIP
25 TO GOOGLE OR A RELATIONSHIP TO CLASS COUNSEL, THAT IS

1 WHAT THEY WERE CONCERNED WITH, AND I UNDERSTAND THAT,
2 AND THAT IS WHAT WE HAVE TRIED TO RECTIFY IT. I DON'T
3 WANT ANY OF THESE RECIPIENTS HAVING ANY RELATIONSHIPS TO
4 GOOGLE OR COUNSEL OR ANYBODY.

5 SO WHEN I READ THAT PART OF THE OPINION,
6 I THOUGHT THAT THAT IS REALLY WHAT THEY WERE GETTING AT.
7 I DON'T THINK, FROM MY READING OF IT, THEY WERE SAYING
8 THAT A FIVE AND-A-HALF MILLION DOLLAR SETTLEMENT ON
9 THESE FACTS IS OFFENSIVE. IT'S JUST THE WAY IT WAS PUT
10 TOGETHER WHERE THEY ARE CONCERNED ABOUT GOOGLE HAVING TO
11 DECIDE WHO GETS THE MONEY. THAT IS THE PROBLEM. THAT
12 IS WHERE WE --

13 THE COURT: DON'T YOU THINK THEY WERE
14 REFERRING THAT THE LAWYERS WERE GETTING PAID, GOOGLE WAS
15 GETTING A RELEASE, THE CY PRES, AS YOU INDICATED HAS
16 SOME RELATIONSHIP TO SOME OF THE LAWYERS AND FINALLY
17 THAT THE MEMBERS OF THE CLASS WERE NOT RECEIVING ANY
18 BENEFIT?

19 MR. STRANGE: RIGHT.

20 I DO THINK THAT WAS PART OF THE
21 IMPLICATION AND I WOULD LIKE TO ADDRESS THAT. WITH
22 RESPECT TO -- LET ME PUT THE LAWYERS' FEES ASIDE.

23 WITH RESPECT TO THE CY PES, WHAT WE ARE
24 FACED WITH HERE IS, WE HAVE MILLIONS OF CLASS MEMBERS
25 WITH VERY NOMINAL DAMAGES AND LET'S SAY IF GOOGLE SAYS

1 IF I GET THEM TO PAY -- AND THIS IS WHAT THE MEDIATOR
2 CAME UP WITH, THIS FIVE AND-A-HALF MILLION DOLLARS AND
3 THE QUESTION IS: WHAT DO WE DO WITH THAT KIND OF
4 SETTLEMENT? IS THAT TOO SMALL OF A SETTLEMENT BASED ON
5 WHERE WE ARE IN THIS CASE? THE RISK OF GETTING ZERO AND
6 EXPENSES OF LITIGATION UNDER THE GIRSH FACTORS AND
7 PRUDENTIAL FACTORS OR IS THAT A FAIR SETTLEMENT AND, IF
8 SO, HOW DO WE DISTRIBUTE THAT TO THE CLASS.

9 SO IN THE OPINION OF THE MEDIATOR, JUDGE
10 PHILLIPS, HE FELT THAT WAS A FAIR SETTLEMENT AND YOU
11 KNOW FRANKLY, IT PROBABLY IS A FAIR SETTLEMENT BASED ON
12 THE FACT THAT THE CLASS MEMBERS HAVE THESE NOMINAL
13 DAMAGES.

14 AS I SAID, IF WE HAD STATUTORY CLAIMS, IT
15 WOULD BE A WHOLE DIFFERENT BALLGAME. SO IF YOUR HONOR
16 IS CONVINCED THAT THAT FIVE AND-A-HALF MILLION IS A FAIR
17 SETTLEMENT, THEN DO WE JUST TRY TO DISTRIBUTE THAT IN
18 MINIMAL, MINIMAL AMOUNTS TO THE CLASS MEMBERS OR IS IT
19 BETTER FOR THE CLASS TO HAVE A CY PRES AWARD WHERE WE
20 HAVE MILLIONS OF DOLLARS GOING TO INDEPENDENT COMPANIES
21 WHO ARE MONITORING WHAT IS GOING ON ABOUT DATA PRIVACY,
22 AND SO IT SEEMS TO ME, AND THAT IS WHAT THE OBJECTOR
23 ARGUED ON APPEAL IS, YOU SHOULD REALLY JUST GIVE THIS
24 MINIMAL AMOUNT TO THE CLASS, AND IT'S REALLY -- A DIRECT
25 DISTRIBUTION TO THE CLASS IS MUCH BETTER AND I THINK THE

1 COURT OF APPEALS SAID NO, THAT CAN BE APPROPRIATE.

2 IT IS PARTICULARLY APPROPRIATE HERE
3 BECAUSE THE INTERNET AND THE DATA PRIVACY ISSUES ARE
4 EVOLVING VERY RAPIDLY AND TO HAVE AN INDEPENDENT COMPANY
5 WITH MILLIONS OF DOLLARS TO CHECK A COMPANY LIKE GOOGLE,
6 I THINK, IS A GREAT BENEFIT TO THOSE PEOPLE THAT HAVE
7 BEEN HARMED AND IF THAT IS THE CASE, THEN I THINK WE
8 HAVE PRESENTED A SETTLEMENT THAT IS VIABLE AND A BENEFIT
9 TO THE CLASS.

10 THE COURT: LET ME HEAR FROM GOOGLE NOW.

11 MR. STRANGE: THANK YOU, YOUR HONOR.

12 MR. WEIBELL: THANK YOU, YOUR HONOR.

13 HOPEFULLY EVERYBODY CAN HEAR ME OKAY.

14 I'M GRATEFUL FOR THE OPPORTUNITY TO
15 RESPOND TO SOME OF THESE QUESTIONS.

16 WE DO HAVE THE RESPONSE TO THE
17 ASCERTAINABILITY QUESTION AND THE OTHER QUESTIONS THAT
18 THE COURT HAS RAISED.

19 FIRST, WITH RESPECT TO THE
20 ASCERTAINABILITY QUESTION, IN THIS CONTEXT, GOOGLE
21 THINKS IT IS APPROPRIATE FOR THE COURT TO CERTIFY THE
22 CLASS UNDER RULE 23 (B) (2) OR 23 (B) (3). THE KEY ISSUE
23 IS WHETHER THE ELEMENTS OF DUE PROCESS ARE SATISFIED AND
24 THAT IS WHAT WAS IDENTIFIED IN THE THIRD CIRCUIT'S
25 OPINION IN THIS CASE WAS, LET'S SEND THIS BACK FOR THE

1 COURT TO DETERMINE WHETHER DUE PROCESS IS BEING VIOLATED
2 WHEN YOU ARE ASKING CLASS MEMBERS TO RELINQUISH THEIR
3 MONETARY CLAIMS IN EXCHANGE FOR PURELY CY PRES RELIEF.
4 AND HERE WE FORESAW THAT PROBLEM GOING INTO THIS
5 SETTLEMENT, AND FOR THAT REASON WE NEGOTIATED A
6 CLASS-NOTICE PROCESS WHERE WE WOULD GIVE THE BEST
7 PRACTICAL NOTICE TO THE CLASS MEMBERS AND WE WOULD GIVE
8 THEM A CHANCE TO OPT-OUT OF THE SETTLEMENT SO THAT THEY
9 WOULD HAVE THAT OPPORTUNITY TO ADDRESS THOSE DUE PROCESS
10 ISSUES.

11 NOW, WITH RESPECT TO ASCERTAINABILITY,
12 THE THIRD CIRCUIT HAS RECOGNIZED IN A NUMBER OF OPINIONS
13 AND MOST OF THOSE OPINIONS CITE BACK TO THE THIRD
14 CIRCUIT'S DECISION IN THE SULLIVAN VERSUS DB INVESTMENTS
15 CASE. THAT CASE IS CITED IN OUR PAPERS.

16 IT WAS AN EN BANC DECISION BY THE THIRD
17 CIRCUIT AND NOTABLY THERE, THE OBJECTORS HAD RAISED VERY
18 SIMILAR CONCERNS THAT HOW CAN YOU CERTIFY A CLASS IN
19 THIS SITUATION WHERE THERE WERE GOING TO BE DIFFICULT
20 ISSUES FOR MEMBERS TO IDENTIFY THEMSELVES AND TO
21 INDIVIDUAL ISSUES THAT WOULD PROVE THAT THEY HAD BEEN
22 DAMAGED AND THAT TYPE OF THING.

23 AND THE THIRD CIRCUIT RECOGNIZED IN THE
24 SULLIVAN CASE, IN THE SETTLEMENT CONTEXT, THE ANALYSIS
25 IS DIFFERENT BECAUSE WE ARE AGREEING TO SETTLE THE CASE

1 AND BECAUSE WE ARE AGREEING TO THE CY PRES INJUNCTIVE
2 RELIEF, CLASS MEMBERS ARE NOT REQUIRED TO IDENTIFY
3 THEMSELVES TO SUBMIT A CLAIM. THEY ARE NOT REQUIRED TO
4 PROVE THAT THEY HAVE THE COOKIE TO DO ANYTHING, RIGHT,
5 SO THOSE CONCERNS GO AWAY. THAT IS WHAT THE THIRD
6 CIRCUIT RECOGNIZED. IN THE SETTLEMENT CONTEXT, THOSE
7 CONCERNS GO AWAY. AND SO YOU ARE LEFT WITH THE DUE
8 PROCESS CONCERNS WHICH ARE, OKAY, WELL, ARE WE GIVING
9 THE DUE PROCESS THAT IS NECESSARY FOR THESE CLASS
10 MEMBERS TO RECOGNIZE WHETHER THEY HAVE A CLAIM AND
11 WHETHER THEY ARE WILLING TO GIVE THAT UP, AND THAT HAS
12 BEEN SATISFIED HERE BECAUSE THE NOTICE DID GO OUT AS
13 MR. STRANGE MENTIONED, THERE WERE SOME PEOPLE WHO
14 DECIDED TO OPT-OUT. THERE WAS ONLY ONE OBJECTOR.
15 MR. FRANK OBJECTED, AND FOR THOSE CLASS MEMBERS
16 LOOKING -- FIRST, IF I'M STAYING AT HOME AND I GET THIS
17 NOTICE THAT I'M POTENTIALLY A MEMBER OF THE CLASS, I
18 HAVE TO FIGURE OUT, AM I A MEMBER OF THE CLASS? DO I
19 HAVE THE ABILITY TO LITIGATE MY OWN CLAIMS HERE? IF SO,
20 WHAT WERE MY DAMAGES? AND THE ANSWER IS, I HAVE NO
21 DAMAGES, RIGHT, AND THAT IS WHAT JUDGE ROBINSON
22 RECOGNIZED LONG AGO IN THIS CASE. THIS IS NOT A CASE
23 WHERE THE INDIVIDUAL CLASS MEMBERS WOULD BE ABLE TO
24 PROVE INDIVIDUAL DAMAGES AND RECOVER.

1 RECEIVED A COOKIE BY THE MEANS ALLEGED IN THE COMPLAINT,
2 RIGHT, A COOKIE THROUGH THESE ALLEGEDLY DECEPTIVE MEANS.
3 WE THINK IT IS IMPOSSIBLE. AT MOST, IT'S VERY, VERY
4 DIFFICULT. AND SO UNDER THOSE CIRCUMSTANCES, IT
5 CERTAINLY DOES SATISFY DUE PROCESS TO SAY, YOU KNOW
6 WHAT, WE ARE GOING TO ALLOW CLASS MEMBERS TO RELINQUISH
7 THEIR MONETARY CLAIMS IN EXCHANGE FOR THIS CY PRES
8 RELIEF, AND THERE IS NOT VERY MUCH AUTHORITY ON THE
9 QUESTION OF WHETHER YOU CAN CERTIFY A 23 (B) (2) CLASS IN
10 A SETTLEMENT CONTEXT WHERE CLASS MEMBERS ARE
11 RELINQUISHING CLAIMS FOR MONEY DAMAGES. THERE IS PLENTY
12 OF AUTHORITY; HOWEVER, THAT YOU CAN CERTIFY A 23 (B) (3)
13 CLASS WHERE THE CLASS MEMBERS RECEIVED NOTHING OTHER
14 THAN MAYBE SOME INJUNCTIVE RELIEF AND IN THOSE CASES
15 THAT DISCUSSED THE 23 (B) (2) ISSUE, THE FOCUS IS ON THE
16 DUE PROCESS ELEMENT. THAT IS EXACTLY WHAT THE THIRD
17 CIRCUIT HERE FOCUSED ON, RIGHT, IT CITED A COUPLE OF
18 CASES FROM THE NCAA CASE AND SOME OTHERS, WANTING TO
19 MAKE SURE THAT DUE PROCESS WAS ADDRESSED HERE. IT
20 REALLY WAS. CLASS MEMBERS HAD THE SAME NOTICE THEY
21 WOULD GET IN A 23 (B) (3) CIRCUMSTANCE. THEY WOULD HAVE
22 THE SAME OPPORTUNITY TO OPT-OUT AS THEY DID IN THE 23
23 (B) (3) CIRCUMSTANCE, AND THAT PROCESS WORKED.

24 THE ISSUE IS NOW, IS IT FAIR NOW TO GIVE
25 THEM AN OPPORTUNITY TO RELEASE THEIR CLAIMS WITHOUT

1 GETTING ANY MONEY DAMAGES AND FOR THAT, WE NEED ONLY
2 LOOK AGAIN, BACK TO THE SULLIVAN CASE, THE EN BANC
3 DECISION FROM THE THIRD CIRCUIT. OBJECTORS MADE A
4 SIMILAR ARGUMENT THERE. IN THAT SITUATION THERE WERE
5 POTENTIALLY MILLIONS OR AT LEAST HUNDREDS OF THOUSANDS
6 OF CLASS MEMBERS WHOSE CLAIMS WERE LESS THAN A THRESHOLD
7 THAT WAS SET BY THE SETTLEMENT. IN ORDER TO RECOVER,
8 YOU HAD TO PROVE YOU HAD SUFFERED SOMETHING AS MUCH AS
9 \$10, RIGHT, THAT WAS THE FORMULA THEY HAD AGREED TO AND
10 THE ARGUMENT WAS, WELL, THAT MEANS EVERYBODY WHO'S UNDER
11 THAT \$10 THRESHOLD IS GOING TO WALK AWAY WITH NOTHING
12 FROM THE SETTLEMENT. HOW CAN WE INCLUDE THEM IN THE
13 SETTLEMENT, BIND THEM BY THE SETTLEMENT IF THEY ARE
14 GETTING NOTHING OUT OF IT? AND THE THIRD CIRCUIT SAID,
15 THAT IS JUST THE WAY IT WORKS, THAT IS TOTALLY FAIR
16 BECAUSE IF THEIR RECOVERY IS THAT SMALL, THAT DE
17 MINIMUS, THERE IS NO PROBLEM WITH CERTIFYING A CLASS
18 THAT TAKES CARE OF IT, BECAUSE IT PROVIDES THEM AS MUCH
19 BENEFIT AS THEY CAN EXPECT HAD THEY GONE THROUGH TRIAL,
20 RIGHT, PAID FOR TRIAL, AND THEN GOTTEN LESS THAN \$10 IN
21 RETURN. AND THAT IS CERTAINLY THE SITUATION HERE.

22 THE OTHER QUESTION YOUR HONOR ASKED WAS
23 ABOUT WHAT IS CHANGED? WHY DID THE THIRD CIRCUIT'S
24 COMMENTS ABOUT THE VIEW OF THIS CASE, HAS THAT CHANGED
25 AT ALL? AND THE ISSUE IS -- THE ANSWER TO THAT IS, THE

1 THIRD CIRCUIT WAS LOOKING ONLY AT THE ALLEGATIONS IN THE
2 COMPLAINT. AND THE THIRD CIRCUIT DID NOT HAVE THE
3 BENEFIT THAT COUNSEL FOR BOTH PLAINTIFFS AND GOOGLE AND
4 THE PARTIES HAD WHEN THEY NEGOTIATED THE SETTLEMENT AND
5 THAT THE DISTRICT COURT HAD TO HAVE BEEN DEALING AND
6 HEARING FROM US ON THESE ISSUES ALL ALONG, IS THAT THE
7 FACTS ARE NOT WHAT HAS BEEN BEING ALLEGED IN THE
8 COMPLAINT, RIGHT, THE ACTUAL CASE IS NOT AS STRONG AS
9 WHAT HAS BEEN ALLEGED IN THE COMPLAINT. IN ORDER TO
10 HELP THE COURT SEE THAT THIS SECOND-TIME AROUND, WHAT WE
11 HAVE DONE, WE SUBMITTED TO THE COURT A VERY LENGTHY
12 DECLARATION FROM GOOGLE TO SHOW THE COURT WHAT THE
13 TESTIMONY WOULD BE IN THIS CASE. WHAT THE EVIDENCE
14 WOULD SHOW IN THIS CASE ABOUT THE PLACEMENT OF THE
15 COOKIES, THE ALLEGED INJURY TO CONSUMERS. THAT IS THE
16 DECLARATION OF LAWRENCE YOU THAT WE SUBMITTED WITH OUR
17 STATEMENT IN SUPPORT OF THE SETTLEMENT AND WE HAVE
18 EXPLAINED WHAT THAT SHOWS IN OUR STATEMENT AS WELL, BUT
19 WHAT IT SHOWS IS SIMPLY THIS.

20 AFTER THE THIRD CIRCUIT REMANDED THE CASE
21 IN 2015 -- SO ORIGINALLY, JUDGE ROBINSON DISMISSED
22 EVERYTHING. ALL CLAIMS WERE OUT, WENT UP ON APPEAL.

23 THE THIRD CIRCUIT AFFIRMED DISMISSAL OF
24 ALL CLAIMS EXCEPT FOR A CLAIM BASED ON THE ALLEGATION
25 THAT GOOGLE HAD POSTED IN A STATEMENT SAYING THAT USERS

1 OF THE SAFARI BROWSER, IF THEY DID NOT CHANGE THEIR
2 SETTINGS, THEY WOULD NOT GET THIS TRACKING COOKIE, THIS
3 DOUBLE CLICKED AD COOKIE. AND THEY SAID BASED ON THAT,
4 THAT IS ENOUGH TO SEND THE CASE BACK. SO IF THAT WAS
5 ALL THAT WAS LEFT OF THE CASE ON REMAND, AND WHEN GOOGLE
6 AND PLAINTIFFS' COUNSEL LOOKED AT THAT CLAIM, IT WOULD
7 REQUIRE THE CLASS MEMBERS TO PROVE THAT GOOGLE INTENDED
8 TO DECEIVE THEM, INTENDING TO MAKE THIS FALSE STATEMENT
9 TO SET AN EXPECTATION OF PRIVACY, AND THEN COLLECT THEIR
10 INFORMATION REGARDLESS, AND THE FACTS SHOW THAT THAT
11 ACTUALLY WAS NOT TRUE BECAUSE THE STATEMENT HAD BEEN
12 POSTED AT A TIME WHEN THE STATEMENT WAS TRUE, AND IT WAS
13 A COUPLE OF YEARS LATER THAT APPLE -- SO THE STATEMENT
14 WAS TRUE WHEN IT WAS MADE. THE STATEMENT THAT WAS
15 POSTED THAT WAS REALLY THE HEART OF THE CLAIM THAT WAS
16 REMANDED WAS A TRUE STATEMENT WHEN IT WAS MADE AND APPLE
17 LATER CHANGED THE WAY THE SAFARI BROWSER WORKED, AND
18 WHEN IT DID THAT, THE STATEMENT NO LONGER BECAME TRUE.
19 THAT WAS THE FOCUS OF THE GOVERNMENT'S INQUIRY; THAT WAS
20 THE FOCUS OF THIS CLAIM THAT WAS ALSO LEFT IN THIS CASE
21 UPON REMAND AND SO WE SAW THAT, UNDER THE CIRCUMSTANCES,
22 IT WOULD BE EXTREMELY DIFFICULT FOR ANYONE HERE TO CLAIM
23 THAT THEY SAW THAT STATEMENT. THAT THEY RELIED ON THAT
24 STATEMENT AND THAT THEY DIDN'T HAVE THE TRACKING COOKIE
25 ON THEIR BROWSERS UNTIL THEY RELIED ON THAT STATEMENT

1 AND THEN VISIT A WEBSITE AND GOT IT, AND THEN LASTLY,
2 THAT THEY WERE EVEN INJURED BY IT, RIGHT, IN THE FORM OF
3 COMPENSATORY MONETARY DAMAGES.

4 SO WE ALL SAW WHEN WE WERE NEGOTIATING
5 THE SETTLEMENT THAT THERE WAS NOTHING LEFT TO THIS CASE.
6 CERTAINLY, WE COULD HAVE DUELING EXPERTS AND GO THROUGH
7 EXPENSIVE DISCOVERY; WE COULD GO THROUGH AN EXPENSIVE
8 TRIAL BUT THE OUTCOME WOULD BE A LOT OF MONEY GOOGLE
9 WOULD PAY TO ITS DEFENSE. A LOT OF MONEY AND TIME THAT
10 THE PLAINTIFFS' LAWYERS WOULD INVEST LITIGATING IT AND
11 THE OUTCOME FOR THE CLASS WOULD BE NO DIFFERENT THAN
12 WHAT THEY ARE ALREADY GETTING UNDER THE SETTLEMENT,
13 RIGHT, THEY ARE GETTING COMPLETE REMEDIAL RELIEF BECAUSE
14 THE COOKIES HAVE BEEN EXPIRED SO THE COOKIES WERE TAKEN
15 CARE OF. THERE ARE NO LONGER COOKIES ON THEIR BROWSERS.

16 THE COURT: LET ME ASK A QUESTION.

17 WHAT WAS THE SETTLEMENT WITH THE FTC?

18 WHAT DID THAT PROVIDE, AND HOW DOES THAT
19 DIFFER FROM WHAT YOU HAVE HERE NOW?

20 MR. WEIBELL: GOOD QUESTION, YOUR HONOR.

21 THERE WAS A MONETARY COMPONENT TO THE
22 FTC, SEVERAL MILLION DOLLARS. THERE WAS ALSO THE
23 INJUNCTIVE RELIEF OBTAINED FOR THE FTC THAT WE WOULD
24 EXPIRE THE COOKIES THAT WERE AT ISSUE, AND TAKE CARE OF
25 THEM THAT WAY. THE DIFFERENCE THOUGH IS, YOU CAN'T LOOK

1 AT -- THE FTC SETTLEMENT WAS -- THAT DEAL WAS STRUCK IN
2 THE CONTEXT OF OTHER ONGOING INVESTIGATIONS INTO GOOGLE
3 AND TO OTHER CONDUCT, AND IT WAS THE RESULT OF A PRIOR
4 CONSENT DECREE, AS WELL.

5 GOOGLE HAD ENTERED INTO A PRIOR CONSENT
6 DECREE WITH THE FTC IN ANOTHER CASE ON ANOTHER MATTER,
7 AND THE FOCUS OF THE FTC SETTLEMENT WAS TO ADDRESS AN
8 ISSUE THAT THE FTC FELT GOOGLE HAD NOT COMPLIED WITH,
9 WITH RESPECT TO THAT ORDER IN THIS CASE, IF THAT MAKES
10 SENSE. SO YOU CAN'T LOOK AT THE SETTLEMENT WITH THE FTC
11 IN ISOLATION. IT WAS REALLY PART OF AN ONGOING --

12 THE COURT: WELL, THAT MAY BE BUT AS A
13 RESULT OF THAT SETTLEMENT, GOOGLE AGREED TO -- AND THERE
14 WAS INJUNCTIVE RELIEF WHEREIN GOOGLE AGREED TO CEASE THE
15 PRACTICE OR NOT TO IMPLEMENT THAT PRACTICE IN THE
16 FUTURE.

17 THIS SETTLEMENT IN THIS CASE APPEARS TO
18 TRACK THAT, AS FAR AS THE INJUNCTIVE RELIEF IS
19 CONCERNED. DO I HAVE THAT RIGHT?

20 MR. WEIBELL: THAT'S CORRECT, BUT IT
21 GIVES TWO SIGNIFICANT BENEFITS TO THE CLASS THAT THEY
22 DON'T GET FROM THE FTC SETTLEMENT.

23 SO IT GIVES THEM THE CONTRACTUAL RIGHTS
24 SO IF GOOGLE FAILS TO LIVE UP TO ITS OBLIGATION TO
25 REMOVE THOSE COOKIES OR TO ABIDE BY WHAT IT SAID IT IS

1 GOING TO DO, IT GIVES THEM THE CONTRACTUAL RIGHT TO SUE
2 FOR BREACH OF CONTRACT, RIGHT, BECAUSE THEY HAVE NOW
3 THIS OBLIGATION THAT GOOGLE IS BOUND TO. A PRIVATE
4 RIGHT OF ACTION THEY DID NOT HAVE BEFORE.

5 IT ALSO AGREES TO PAY MILLIONS OF DOLLARS
6 TO THESE PRIVACY ORGANIZATIONS THAT WERE THE VERY -- ONE
7 OF THEM WAS THE VERY PRIVACY ORGANIZATION THAT
8 IDENTIFIED THIS ISSUE. THAT MONEY KEEPS THESE
9 ORGANIZATIONS OPERATING SO THE SECURITY RESEARCHERS CAN
10 DETECT THESE FLAWS IN WHAT'S GOING ON IN THE SYSTEM,
11 RIGHT? YEARS AGO, THE WAY THIS CASE AROSE WAS BECAUSE
12 THERE WAS A PRIVACY RESEARCHER AT ONE OF THESE
13 ORGANIZATIONS THAT WAS AN ORIGINAL CY PRES RECIPIENT IN
14 THIS CASE WHO DETECTED THAT THIS WAS HAPPENING WITH THE
15 COOKIES. GOOGLE WAS NOT AWARE OF THE PROBLEM. NOBODY
16 WAS AWARE OF THE PROBLEM. THIS RESEARCHER, THROUGH VERY
17 TECHNICAL MEANS, DISCOVERED IT, PUBLISHED IT. IT BECAME
18 AWARE TO GOOGLE, THE GOVERNMENT AND PLAINTIFFS' COUNSEL
19 AND THAT IS WHAT TRIGGERED THIS WHOLE LITIGATION AND
20 EVERYTHING RESULTING FROM IT.

21 AND SO, WE ARE ALSO GIVING MONEY THROUGH
22 THE SETTLEMENT TO ORGANIZATIONS LIKE THAT TO HELP POLICE
23 THESE ISSUES. THAT IS REALLY THE BEST REMEDY THAT CLASS
24 MEMBERS IN THIS SITUATION AND WHO, THEY CARE ABOUT THEIR
25 PRIVACY, BUT HAVE NOT NECESSARILY BEEN DAMAGED.

1 THE COURT: SO AS I UNDERSTAND IT THEN,
2 WHICH MAYBE FINE, THE INJUNCTIVE RELIEF WAS BASICALLY IN
3 PLACE ALREADY, AND GOOGLE, IN FACT, HAD STOPPED THIS
4 PRACTICE, BUT WHAT YOU ARE OFFERING THE CLASS IS
5 THE ABILITY THAT THEY CAN NOW DO THIS PRIVATE RIGHT OF
6 ACTION AS OPPOSED TO RELYING ON THE FTC, WHICH I ASSUME
7 ENFORCES THE AGREEMENTS THAT THEY HAVE ENTERED INTO, AND
8 THEN THERE WILL BE SOME FINANCING OF ORGANIZATIONS THAT
9 CAN MONITOR COMPLIANCE WHICH IS PROBABLY A SOPHISTICATED
10 UNDERTAKING TO BE ABLE TO DO THAT. SO THAT IS, IN A
11 SENSE, WHAT THIS IS ALL ABOUT.

12 NOW, IF THAT WAS ALREADY IN THE PRIOR
13 AGREEMENT THAT YOU ENTER INTO WITH THE CLASS, SO I'M
14 JUST TRYING TO THINK IF THAT AGREEMENT DIDN'T PASS
15 MUSTER, I DON'T SEE HOW THIS ONE COULD.

16 MR. WEIBELL: GOOD QUESTION, YOUR HONOR.

17 THE REASON WHY IT DID NOT PASS MUSTER WAS
18 BECAUSE THE THIRD CIRCUIT WAS LOOKING AT THE RECORD, AND
19 IT DID NOT SEE THAT JUDGE ROBINSON HAD PUT INTO THE
20 RECORD THE FINDINGS THAT WE HAVE BEEN EXPLAINING, RIGHT,
21 ABOUT THE WEAKNESS OF THE CLAIMS GOING FORWARD.

22 THE COURT: ARE YOU TELLING ME THAT THE
23 CIRCUMSTANCES HAVE EVOLVED? THERE HAS BEEN AN EVOLUTION
24 IN THIS BUSINESS, AND THAT EVOLUTION WAS NOT REFLECTED
25 ON THE RECORD WHICH WENT UP TO THE THIRD CIRCUIT BECAUSE

1 OF THE PASSAGE OF TIME. AND AS COUNSEL FOR THE CLASS
2 INDICATED, I MEAN, WE ALL KNOW, THIS IS A RAPIDLY
3 REVOLVING TECHNOLOGY AND INDUSTRY SO THINKING THAT THOSE
4 CHANGES NEVER REALLY GOT INTO THE MIND OF THE THIRD
5 CIRCUIT?

6 MR. WEIBELL: I THINK THE THIRD CIRCUIT
7 DID NOT -- SO WHAT WE HAVE DONE HERE IS WE PUT INTO THE
8 RECORD EVIDENCE THAT SHOWS REALLY THE STRENGTHS, OR IN
9 THIS CASE, THE WEAKNESSES OF THE CLAIMS GOING FORWARD.
10 THE THIRD CIRCUIT DID NOT HAVE THE BENEFIT OF THAT BUT
11 WHAT THEY WERE REALLY LOOKING AT IS THEY ASKED -- THE
12 QUESTION THEY PUT BACK TO THIS COURT WAS TO CONSIDER
13 WHETHER THE NOTICE HAD BEEN GIVEN, RIGHT, WHETHER DUE
14 PROCESS WAS SATISFIED BECAUSE NOTICE WAS GIVEN. WHETHER
15 THE PREDOMINANCE AND SUPERIORITY ISSUES WERE SATISFIED
16 IN THIS CASE AND THEN THERE WAS THE CY PRES ISSUE WHICH
17 --

18 THE COURT: I THINK AGAIN, I MEAN, I
19 THINK I'M QUOTING WHAT THEY SAID.

20 THE DISTRICT THE COURT DID NOT ASSESS
21 FAIRNESS, REASONABLENESS AND ADEQUACY. THAT IS WHAT THE
22 THIRD CIRCUIT SAID THE DISTRICT COURT DID NOT DO.

23 YOU FOLKS SEEM TO THINK THAT THERE ARE
24 LITTLE THINGS THAT CAN BE FIXED. I THINK THOSE WORDS
25 MEAN YOU GOT TO GO TO THE BEGINNING AND FIGURE OUT WHAT

1 HAPPENED HERE.

2 I WANT TO UNDERSTAND WHAT I'M SUPPOSED TO
3 DO. I READ THE OPINION AND THEY SAID, YOU BETTER LOOK
4 AT IT AND, IN FACT, IT EMPHASIZES THE NEED FOR SCRUTINY,
5 INTENSE SCRUTINY OF WHAT THE AGREEMENT IS AND THEN IT
6 SAYS, THE DISTRICT COURT DID NOT DO IT, YOU GO AND DO IT
7 BUT YOU ARE TELLING ME THAT THERE IS JUST A COUPLE
8 NARROW ISSUES AND THAT IS IT.

9 MR. WEIBELL: YOUR HONOR, TO BE FAIR, THE
10 ISSUES ARE NARROW BUT THE ANALYSIS TO BE DONE -- YOUR
11 HONOR IS EXACTLY RIGHT. THE THIRD CIRCUIT WANTS THIS
12 COURT TO GO AND DO THE THOROUGH ANALYSIS. WE THINK THE
13 SETTLEMENT SURVIVES THAT ANALYSIS. WHEN YOU LOOK AT THE
14 THIRD CIRCUIT, THEY DID NOT DO THE ANALYSIS. THEY WANT
15 THIS COURT TO DO IT.

16 SO I THINK IT IS IMPORTANT TO RECOGNIZE
17 THAT THE THIRD CIRCUIT DID NOT REJECT THE SETTLEMENT ON
18 ITS MERITS BY ANY MEANS. IT JUST WANTED THE DISTRICT
19 COURT TO MAKE THE FACTUAL FINDINGS RELATED TO THE
20 APPROPRIATE FACTORS SO THAT THEY WOULD HAVE THE FULL
21 RECORD AHEAD.

22 IN ORDER TO HELP THE COURT DO THAT, WE
23 HAVE PROVIDED THE LAWRENCE YOU DECLARATION WHICH HELPS
24 THE COURT SEE THE MERITS OF THE CASE, RIGHT. WE HAVE
25 PROVIDED THE OTHER DESCRIPTIONS OF THE PROCEDURAL

1 HISTORY IN THIS CASE. THE COURT CAN SEE LEGALLY WHAT IS
2 LEFT IN THE CASE. WHAT THE LEGAL BURDEN ON THE
3 PLAINTIFFS WOULD BE IF THEY WERE TO GO FORWARD AND SO
4 THE COURT HAS ALL OF THE MATERIALS IT NEEDS IN ORDER TO
5 EVALUATE THE SETTLEMENT UNDER THE PROCTOR FACTORS AND I
6 THINK BOTH MR. STRANGE AND I ARE PREPARED TO ADDRESS ANY
7 SPECIFIC QUESTIONS ABOUT THOSE FACTORS. I THINK IT IS
8 EASY TO SATISFY THE FACTORS IN THIS CASE AND WE ARE
9 PRESENTING OURSELVES SO THAT WE CAN ANSWER THE COURT'S
10 QUESTIONS ON ANY OF THOSE ISSUES IF THE COURT HAS THEM,
11 BUT WE DO FEEL LIKE IT DOES MEET THOSE FACTORS.

12 THE COURT: I THINK THAT MR. STRANGE
13 WANTED TO JUMP BACK IN.

14 WHY DON'T YOU DO THAT NOW.

15 MR. STRANGE: THANK YOU, YOUR HONOR.

16 I THINK ONE OF THE THINGS THAT THE COURT
17 OF APPEALS SAID IN THEIR OPINION IS, IN THIS CASE, DOES
18 THE DISTRICT COURT FIND THAT THERE IS SUFFICIENT
19 JUSTIFICATION FOR A CY PRES ONLY DISTRIBUTION TO THE
20 CLASS MEMBERS? I THINK WHAT WAS LACKING IN THE RECORD
21 -- IT MAY HAVE BEEN IN THE RECORD BUT PERHAPS WE DID NOT
22 EXPLAIN IT APPROPRIATELY AND LAY IT OUT FOR THE DISTRICT
23 COURT LAST TIME WAS WHEN WE LOOK AT THIS CASE, WHAT ARE
24 THE STRENGTHS OF OUR CLAIM? AND WHAT ARE THE POTENTIAL
25 BENEFITS TO THE CLASS IF WE PROCEED THROUGH TRIAL. WHAT

1 IS THE EXPENSE OF PROCEEDING THROUGH TRIAL? AND AS YOUR
2 HONOR KNOWS, THERE ARE CASES THAT BASICALLY SAY, A
3 SETTLEMENT IS A PRACTICAL TOOL THAT SHOULD BE ROOTED IN
4 THE PARTICULAR FACTS OF THE CASE AND THE PROCEDURAL
5 POSTURE AT THE TIME. SO THAT IS WHY I'M GETTING TO THE
6 FACT THAT NINE YEARS LATER WE ARE HERE ON THESE
7 IMPORTANT DATA PRIVACY ISSUES AND WHAT WE HAVE IS A
8 PROPOSAL TO NOT GIVE THIS AMOUNT OF MONEY TO MILLIONS OF
9 CLASS MEMBERS, BUT TO USE IT TO HELP POLICE A GIANT LIKE
10 GOOGLE IN FUTURE DATA PRIVACY ISSUES. SO I THINK WHAT
11 WE HAVE DONE HERE, HOPEFULLY, IS EXPLAINED AND I'M THE
12 LAST PERSON THAT WANTS TO EXPLAIN WHY MY CASE IS NOT AS
13 GOOD AS I THOUGHT IT WAS, BUT I HAVE AN OBLIGATION, I
14 THINK, TO THE COURT AND TO THE CLASS MEMBERS TO SAY,
15 LISTEN, THIS IS WHERE WE ARE. WE HAVE TWO CLAIMS. WE
16 HAVE A CLAIM UNDER THE CALIFORNIA CONSTITUTION. WE HAVE
17 A CLAIM UNDER CALIFORNIA COMMON LAW FOR A VIOLATION OF
18 PRIVACY, AND I THINK BASED ON THE POTENTIAL RECOVERY OF
19 THOSE CLAIMS, THAT THERE IS SUFFICIENT JUSTIFICATION AND
20 THAT THIS SETTLEMENT DOES BENEFIT THE CLASS AS
21 STRUCTURED AND SO THAT IS PART OF THE RECORD HERE, I
22 HOPE, BUT THE OTHER PART IS, AND NOT TO BELABOR IT, IS
23 JUST THE WAY IT IS DISTRIBUTED. WHO IS GOING TO HAVE
24 THE CONTROL OF THOSE FUNDS WAS A CONCERN BY THE COURT OF
25 APPEALS AND I THINK WE HAVE RECTIFIED THAT BY GIVING

1 COMPLETE CONTROL OF THAT TO A NEUTRAL TO SELECT THESE CY
2 PRES RECIPIENTS WHO HAVE TO FILE A DECLARATION AND
3 APPEAR BEFORE THE COURT IF YOU THINK IT IS APPROPRIATE
4 AT THE FINAL HEARING TO EXPLAIN TO YOU WHAT THEY ARE
5 GOING TO DO WITH THOSE FUNDS AND HOW THOSE FUNDS WILL
6 INDIRECTLY BENEFIT THE CLASS AS WE PROCEED FORWARD IN
7 THESE TYPES OF CASES.

8 THE COURT: I THINK THE CY PRES ISSUE IS
9 RECTIFIABLE. I DON'T THINK THAT IS A REAL ISSUE. I
10 THINK THE ISSUES ARE WHETHER OR NOT YOU ARE GOING TO
11 CERTIFY A (B) (3) CLASS IN THIS CASE UNDER THE FACTS OF
12 THIS CASE, AND WHETHER OR NOT A SETTLEMENT --
13 PARTICULARLY A (B) (3) SETTLEMENT WHICH ONLY HAS AN
14 ATTENUATED RELATIONSHIP THROUGH THE CLASS IS ONE THAT IT
15 IS FAIR AND REASONABLE AND ADEQUATE AND THOSE ARE THE
16 ISSUES.

17 NOW, THE THIRD CIRCUIT DID NOT DEAL WITH
18 (B) (3) BECAUSE IT WAS NOT THERE. SO THE QUESTION IS,
19 CAN YOU GET A (B) (2) CLASS CERTIFIED? I THINK YOU BEGIN
20 WITH THAT, AND THAT TO ME SEEMS A CLOSER CALL BUT FOR
21 THE RELEASE.

22 MR. STRANGE: YOUR HONOR, LET'S SAY THAT
23 WE LOOKED AT THAT, AND WE SAY OKAY, WE SATISFY THE
24 REQUIREMENTS OF A (B) (2) CLASS BECAUSE THE INJUNCTIVE
25 RELIEF AND BECAUSE OF THE CY PRES DAMAGES WHICH I THINK

1 THE THIRD CIRCUIT HAS INDICATED IN THIS CASE ARE
2 APPROPRIATE.

3 SO THE ISSUE ON THE RELEASE, LET'S SAY IF
4 -- AND GOOGLE HAS NOT AGREED TO THIS, BUT WHAT IF YOUR
5 HONOR SAID I APPROVE IT BUT I'M NOT GOING TO RELEASE ANY
6 DAMAGE CLAIMS, THE RELEASE IS TOO BROAD, SO NARROW THE
7 RELEASE. THAT CAN BE A CONDITION OF APPROVAL.

8 AS A PRACTICAL MATTER, YOU KNOW WE HAVE
9 50 OPT-OUTS THAT OPTED OUT IN 2016 AND NONE OF THEM HAS
10 FILED AN ACTION. MAYBE SOME ONE WILL WANT TO FILE A
11 CASE AGAINST GOOGLE AND MAYBE THEY WON'T AGREE TO THE
12 SETTLEMENT IF THEY DON'T GET THAT BROAD RELEASE BUT THAT
13 COULD BE PART OF YOUR HONOR'S ORDER. I WILL, AS A
14 PRACTICAL MATTER, WHICH WE HAVE TO LOOK AT IN THESE
15 TYPES OF CASES, I DON'T SEE THE CLASS MEMBERS BEING
16 AFFECTED MUCH ON THE FACTS OF THIS CASE NINE YEARS LATER
17 WITH THESE TWO CLAIMS RELEASING THEIR DAMAGE CLAIMS AS A
18 PART OF THE SETTLEMENT DOES NOT SEEM TO BE A HUGE ISSUE
19 FOR THE CLASS.

20 THE COURT: AS A PRACTICAL MATTER THEN,
21 GIVEN SOME RATIONALITY, I MEAN, THERE CAN BE SOME
22 STRANGE DEVELOPMENT BUT AS A PRACTICAL MATTER, IS GOOGLE
23 REALLY IN JEOPARDY OF BEING SUED FOR DAMAGES WHEN THE
24 LIKELIHOOD OF ANY DAMAGES IS RATHER MINUSCULE. THERE
25 CAN BE, I GUESS, A THEORETICAL EXPOSURE, BUT IS THERE A

1 REALISTIC EXPOSURE THAT A LAWYER IS GOING TO SPEND TIME
2 AND EFFORT PURSUING A CASE WHICH, LET'S SAY, IS A WEAK
3 CASE? LET'S HEAR FROM GOOGLE.

4 MR. WEIBELL: YES, YOUR HONOR.

5 SO THE ANSWER TO THAT IS BECAUSE GOOGLE
6 IS GOOGLE. GOOGLE IS ALWAYS GOING TO BE SUED BY
7 ENTERPRISING LAWYERS FOR CLAIMS THAT WE THINK HAVE NO
8 MERIT. IN FACT, WE THOUGHT THAT WAS THIS CASE, RIGHT,
9 WE FELT THIS CASE HAD NO MERIT AND INDEED WE DISMISSED
10 -- WE GOT NEARLY EVERY CLAIM DISMISSED IN A FIRM
11 DISMISSAL ON APPEAL.

12 SO I THINK THAT BECAUSE GOOGLE IS GOOGLE
13 THERE IS ALWAYS A RISK THAT GOOGLE WILL BE SUED AND
14 CLASS MEMBERS WHO MAY HAVE BEEN WAITING IN THE WINGS AND
15 WHILE THE STATUTE OF LIMITATIONS HAS BEEN TOLLED BY THIS
16 NINE-YEAR NOW CLASS ACTION THAT HAS BEEN PENDING. I
17 THINK THERE IS STILL A VERY LIVE RISK THAT IT WILL BE
18 SUED AFTER THIS AND FOR THAT REASON, GOOGLE DOES HAVE
19 MUCH OF AN INTEREST IN FORECLOSING THAT BY HAVING THE
20 RELEASE OF MONETARY CLAIMS, BUT IN A WAY THAT
21 RECOGNIZING THAT THOSE CLAIMS ARE NOT WORTH MUCH AND IT
22 WOULD ONLY WASTE JUDICIAL RESOURCES AND PARTY RESOURCES
23 FOR US TO HAVE TO GO THROUGH THIS AGAIN WITH SOME OTHER
24 PLAINTIFFS' COUNSEL WHO FILES, JUST SEEKING TO GET A
25 PAYOFF, RIGHT, I MEAN THAT IS THE ISSUE. THERE ARE

1 ENOUGH PEOPLE KNOWING THAT GOOGLE HAS A DEEP POCKET THAT
2 THEY WOULD BE WILLING TO BRING A MARGINAL CASE JUST IN
3 THE HOPES OF GETTING A PAYOFF, SO THAT IS THE RISK THAT
4 WE ARE TRYING TO AVOID.

5 THE COURT: LET ME THEN TRY TO SUMMARIZE
6 WHAT THE ALTERNATIVES ARE HERE.

7 ONE WOULD BE TO HAVE THE COURT DETERMINE
8 WHETHER -- OR GIVE PRELIMINARY APPROVAL TO CERTIFICATION
9 OF A (B) (2) RULE AND (B) (3) CLASS.

10 NUMBER TWO WOULD BE TO REJECT THE (B) (3)
11 CLASS BUT HOLD THAT A (B) (2) CLASS MINOR THE SETTLEMENT
12 CAN BE CERTIFIED AND THAT THE SETTLEMENT AGREEMENT UNDER
13 THOSE CIRCUMSTANCES WILL BE FAIR AND REASONABLE AND
14 ADEQUATE.

15 AND I SUPPOSE A THIRD OUTCOME WOULD
16 SIMPLY BE THAT YOU GO BACK AND TRY TO WORK SOMETHING OUT
17 OR DROP THE SUIT OR DO SOMETHING ELSE. THAT IS, THAT
18 YOU SAY TO THE COURT, WE WILL HOLD IT. WE WILL BE BACK
19 TO YOU. SO THAT SEEMS TO ME SORT OF THE THREE
20 ALTERNATIVES HERE, AND THAT IS WHY WE ARE HAVING THIS
21 HEARING BECAUSE THERE ARE A LOT OF POSSIBILITIES HERE
22 AND I WANTED TO, AND I THINK YOU HAVE BEEN RESPONSIVE TO
23 MANY OF THE QUESTIONS HERE. I THINK RESPONSIVE IS
24 SOMETHING DIFFERENT THAN SATISFYING ME BUT YOU HAVE
25 CERTAINLY HAVE BEEN FORTHCOMING AND CANDID ABOUT WHAT IS

1 HAPPENING IN THIS CASE.

2 SO WE COULD, AT THE VERY LEAST HAVE HAD,
3 OR NEED TO HAVE SUPPLEMENTAL BRIEFING HERE BUT MAYBE YOU
4 WANT TO THINK ABOUT WHETHER YOU WANT TO STAND ON WHAT
5 YOU HAVE PROPOSED OR WHETHER YOU WANT TO MODIFY IT
6 BEFORE WE GO FORWARD.

7 THE LAST THING WE WANT TO DO IS BURDEN
8 EVERYBODY WITH MORE PAPER -- DIGITAL PAPER NOWADAYS BUT
9 NEVERTHELESS PAPER, BUT AT THE SAME TIME, YOU ARE
10 ENTITLED TO AN ANSWER. THIS IS WHERE YOU WOULD LIKE TO
11 GO.

12 MR. STRANGE, WHAT DO YOU THINK? WHERE
13 SHOULD WE GO WITH THIS?

14 MR. STRANGE: YOUR HONOR, I THINK WE
15 SHOULD DO SOME SUPPLEMENTAL BRIEFING.

16 I MEAN, I CERTAINLY BELIEVE THAT IF WE
17 MODIFIED IT AND DID NOT RELEASE DAMAGE CLAIMS, THAT
18 WOULD BE SOMETHING THAT WE WOULD BE INTERESTED IN AS
19 PLAINTIFFS. I UNDERSTAND THAT GOOGLE MAY NOT BE BUT,
20 YOU KNOW, I OBVIOUSLY LIKE THAT ALTERNATIVE.

21 AND THEN THE SECOND THING, IF WE COULD
22 NOT GET AN ORDER OF THAT, I WOULD LIKE TO CONSIDER
23 WHETHER, UNDER THESE CIRCUMSTANCES THAT WE HAVE
24 EXPLAINED, FURTHER BRIEFING, WHETHER A (B)(3) CLASS
25 WOULD BE APPROPRIATE. IT SOUNDS LIKE YOUR HONOR'S

1 INITIAL INCLINATION IS THAT IT WOULD NOT BE BECAUSE THE
2 BREADTH OF THE RELEASE IS TOO GREAT FOR A (B) (3) .

3 I HAD A QUESTION FOR, YOUR HONOR, WHETHER
4 YOU BELIEVE THAT UNDER -- WE HAVE SATISFIED YOUR HONOR
5 THAT THERE HAS BEEN THE BEST PRACTICAL NOTICE GIVEN ON A
6 (B) (3) CLASS?

7 THE COURT: WE WILL HAVE TO TAKE A LOOK
8 AT IT DEPENDING UPON WHERE WE GO. WHETHER WE HAVE
9 (B) (3) OR THE (B) (2) CLASSES, I DON'T THINK WE CAN AT
10 THIS POINT, AND I MEAN THAT IS A CORRECTABLE ITEM. THE
11 QUESTION IS, IS THERE A MEETING OF THE MINDS BETWEEN THE
12 PARTIES AND DOES IT SATISFY RULE 23. THEN THERE MAY BE
13 SOME TWEAKING THAT NEEDS TO BE DONE BUT I THINK THE
14 THRUST OF IT IS THE CERTIFICATION OF A CLASS AND THE
15 FAIRNESS OF THE SETTLEMENT AND THOSE ARE THE BIG ISSUES.

16 SO IT SEEMS TO ME THEN THAT WHAT I OUGHT
17 TO DO IS ENTER AN ORDER ASKING FOR ADDITIONAL BRIEFING
18 AND IN THAT ORDER MAYBE ZERO IN ON SOME OF THE SPECIFIC
19 QUESTIONS THAT I WOULD LIKE TO HAVE BRIEFED, AND THEN AT
20 THE SAME TIME IF THERE ARE OTHER QUESTIONS, YOU CAN ADD
21 THEM TO YOUR BRIEFING BUT CERTAINLY THE ONES THAT I HAVE
22 THE GREATEST CONCERN COULD BE THERE, AND IN THE
23 MEANTIME, THE TWO OF YOU COULD TALK AGAIN, BECAUSE I
24 DON'T THINK IT'S FAIR TO ASK YOU TO RENEGOTIATE YOUR
25 AGREEMENT HERE ON ZOOM BUT YOU KNOW THERE MAY BE A WAY

1 OF TRYING TO BRIDGE SOME DIFFERENCES HERE BUT YOU DON'T
2 HAVE TO DO IT HERE ON THE AIR.

3 FOR EXAMPLE, I CAN GIVE YOU 30 DAYS FOR
4 SUPPLEMENTAL BRIEFING AND IN THE MEANTIME, YOU CAN WALK
5 AND CHEW GUM, YOU CAN ALSO BE TALKING TO EACH OTHER
6 ABOUT THAT. YOU MAY, IN FACT, I THINK YOU DID, YOU
7 COULD SUBMIT A JOINT SUPPLEMENTAL BRIEF IF YOU WANT TO
8 OR THERE MAY BE SOME DIFFERENCES BETWEEN YOUR POSITIONS,
9 AND AT THE END OF THE 30 DAYS, I EITHER WILL GET
10 SUPPLEMENTAL BRIEFING FROM YOU OR I WILL GET A HOLLER
11 FROM YOU THAT THERE ARE SOME MODIFICATIONS TO WHAT YOU
12 WOULD LIKE TO PRESENT THE COURT IN TERMS OF A SETTLEMENT
13 AGREEMENT. THAT WOULD BE MY SUGGESTION HERE.

14 I DO WANT TO ASK MR. SHULMAN, YOU ARE
15 NOT, I THINK YOU WANTED TO HEAR THE CASE, BUT YOU ARE
16 NOT REALLY PARTICIPATING IN THIS MATTER.

17 WHAT MAY HAPPEN IS, IF WE DO GET A
18 SUPPLEMENTAL BRIEFING, YOU COULD BE ASKED TO BE A FRIEND
19 OF THE COURT TO COMMENT ON THAT SUPPLEMENTAL BRIEFING
20 WHEN IT COMES IN, BUT TO DO SO, WE WOULD ALERT YOU TO
21 THAT SO IF THAT BECOMES SOMETHING THAT WILL BE HELPFUL
22 TO THE COURT. SO I THINK THAT IS WHERE WE ARE.

23 MR. STRANGE, ANYTHING YOU WANT TO ASK OR
24 ADD?

25 MR. STRANGE: NO, YOUR HONOR, I THINK

1 THAT BY SHOWING HOW THAT IS STILL POSSIBLE AND SATISFIES
2 RULE 23 UNDER THE CIRCUMSTANCES.

3 THE COURT: WELL, I THINK THAT, AND EACH
4 PARTY HAS TO MAKE ITS OWN DETERMINATION AS TO WHAT IS
5 THE BENEFIT THAT THEY WOULD OBTAIN SO THAT IS ENTIRELY
6 UNDERSTANDABLE BUT I THINK THAT IS A BIG STUMBLING BLOCK
7 IF YOU WANT TO GET OVER THIS CASE AND MOVE ON WITH LIFE
8 BUT WE WILL SEE. WE WILL SEE WHAT WE WILL GET. OKAY.
9 VERY WELL. ANYTHING ELSE?

10 IF NOT, WE ARE GOING TO BRING THIS TO AN
11 END AND APPRECIATE YOUR PRESENTATIONS AND AS I SAID,
12 THEY HAVE BEEN HELPFUL SO WE WILL ENTER THE APPROPRIATE
13 ORDERS TO MOVE ON FROM HERE. OKAY, WELL THANK YOU.

14 ALL COUNSEL: THANK YOU, YOUR HONOR.

15 (COURT ADJOURNED.)

16

17

18 I CERTIFY THAT THE FOREGOING IS A CORRECT
19 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
20 ABOVE-ENTITLED MATTER.

21

22

Suzanne White

23 3/2/21
24 DATE

SUZANNE R. WHITE

OFFICIAL COURT REPORTER

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